

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DEREK TUCSON, ROBIN SNYDER,
MONSIEREE DE CASTRO, and ERIK
MOYA-DELGADO,

Plaintiffs.

V.

CITY OF SEATTLE, ALEXANDER PATTON, DYLAN NELSON, RYAN KENNARD, and MICHELE LETIZIA,

Defendants.

CASE NO. C23-17 MJP

ORDER ON MOTIONS IN LIMINE AND JURY INSTRUCTIONS

This matter comes before the Court on Plaintiffs' Motions in Limine (Dkt. No. 114) and Defendants' Motions in Limine (Dkt. No. 117). Having reviewed the Motions, the Responses (Nos. 119, 121), and all supporting materials, and having orally ruled on the Motions during the Trial Conference held on May 30, 2024, the Court issues this Order memorializing its oral rulings that contain the Court's more complete reasoning on the issues raised in the Motions.

1 The Court also issues this Order to address certain changes to the preliminary jury
2 instructions that it has made since the final Pretrial Conference held on June 5, 2024. The
3 changes to the jury instructions also alter the Court's determination of two Motions in Limine, as
4 identified below.

5 **MOTIONS IN LIMINE**

6 **A. Agreed Motions in Limine:**

7 Plaintiffs identified ten motions in limine on which the Parties were purportedly in
8 agreement. (Dkt. No. 114 at 4.) But during the Pretrial Conference, Defendants voiced
9 opposition to the third “agreed” topic: “[e]xclusion of prejudicial and irrelevant texts/social
10 media posts by Plaintiffs after the arrests.” (*Id.*) The Court therefore WITHHOLDS RULING on
11 this topic. Additionally, the Court has DENIED the request to allow leading questions of hostile
12 witness—because the Court must first determine whether a witness is hostile, the Court will
13 address this issue as it arises during trial. Additionally, given that the Court has excluded
14 Benjamin Thomas Kennedy as a witness, the Court DENIES as MOOT the Motion concerning
15 his relationship with the City Attorney’s opponent. The Court otherwise GRANTS the Motions
16 as to the seven remaining agreed topics, which are:

- 17 1. Exclusion of non-party witnesses under FRE 615.
- 18 2. Exclusion of handcuffs and key found on Plaintiff Snyder at time of arrest and
19 booking (unless the door is opened at trial).
- 20 3. Exclusion of prior “good acts” of Defendants.
- 21 4. Exclusion of PR Screening Process at jail (unless door is opened).
- 22 5. Exclusion of Plaintiff Tucson’s DUI and dismissed trespassing cases.
- 23 6. Cross-endorsement of Defendants’ witnesses.

1 7. Exclusion of attorneys' fees in event of verdict in Plaintiffs' favor.

2 **B. Plaintiffs' Motions in Limine**

3 1. GRANTED.

4 2. Although the Court granted this Motion in part during the pretrial conference, the
5 Court has reconsidered its decision and now DENIES the Motion. The officers
6 may testify about their belief concerning probable cause and the Parties may
7 discuss probable cause consistent with the Court's revised jury instruction on the
8 Retaliatory Arrest claim.

9 3. DENIED.

10 4. DENIED.

11 5. Agreed and GRANTED.

12 6. DENIED. May be used as rebuttal, if shown to be proper rebuttal.

13 **C. Defendants' Motions in Limine**

14 1. WITHHELD RULING.

15 2. GRANTED.

16 3. DENIED.

17 4. GRANTED.

18 5. GRANTED.

19 6. DENIED.

20 7. DENIED.

21 8. GRANTED, in part.

22 9. DENIED in part and GRANTED in part.

1 10. Agreed and GRANTED.

2 11. Agreed and GRANTED.

3 12. Agreed and GRANTED.

4 13. Agreed and GRANTED.

5 14. DENIED.

6 15. GRANTED.

7 16. Although the Court granted this Motion during the Pretrial Conference, it has
8 reconsidered its decision and now DENIES the Motion given the Court's revision
9 to the Retaliatory Arrest claim jury instruction, as discussed below.

10 17. DENIED.

11 **PRELIMINARY JURY INSTRUCTION REVISIONS**

12 After the Final Pretrial Conference, the Court considered further Defendants' request for
13 the Court to instruct the jury to make factual determinations relevant to the Nieves v. Bartlett,
14 587 U.S. 391 (2019) exception to probable cause. The Court believes that an instruction is
15 necessary, but not as Defendants requested. In Nieves, the Court explained that “[t]he plaintiff
16 pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the
17 arrest.” Nieves, 587 U.S. at 402. But the Court also explained that this probable cause exception
18 is a “threshold showing,” which, once proved, allows “the plaintiff’s claim [to] . . . proceed in
19 the same manner as claims where the plaintiff has met the threshold showing of the absence of
20 probable cause.” Id. at 407–08 (citation omitted). In ruling on the Parties’ cross-motions for
21 summary judgment on the retaliatory arrest claim, the Court found that Plaintiffs proved this
22 threshold showing through undisputed evidence that sufficiently demonstrated that similarly-
23 situated individuals engaged in non-protected conduct have not been arrested. (Order on Cross-
24

1 Motions for Summary Judgment at 20-22 (Dkt. No. 116).) As such, the Court does not find this
2 to be a disputed factual issue for the jury to resolve.

3 Notwithstanding the resolution of this “threshold” issue, the Court believes it necessary
4 to instruct the jury as to its determination there was probable cause to arrest and that officers
5 typically do not exercise their discretion to arrest individuals for chalking or charcoaling on
6 sidewalks and public walls such as the temporary eco-block wall. As the opinion in Nieves
7 makes clear, evidence of probable cause and the lack thereof is relevant to the question of
8 causation and animus. See Nieves, 587 U.S. at 400-02 (noting that the absence or existence of
9 probable cause is ““highly valuable circumstantial evidence”” of retaliatory animus and causation
10 (quoting Hartman v. Moore, 547 U.S. 250, 256 (2006)). The jury should be allowed to hear that
11 there was probable cause to arrest and that officers typically do not arrest individuals for
12 chalking or charcoaling on sidewalks and public walls such as the temporary eco-block wall. The
13 Court expressly includes reference to sidewalks in the jury instruction because, from a
14 constitutional perspective, a sidewalk is indistinguishable from the temporary eco-block wall as
15 far as being a traditional public forum.

16 In light of the Court’s determination, the Court has amended the retaliatory arrest jury
17 instruction and altered its decision on two Motions in Limine, as noted above. Copies of the
18 instructions will be delivered to the parties via e-mail. The Parties may then take formal
19 exception to this set of instructions on the morning of trial on June 12, 2024. The final set used
20 for preliminary instruction of the jury will then be posted to the docket.

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1 The clerk is ordered to provide copies of this order to all counsel.

2 Dated June 7, 2024.

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4 Marsha J. Pechman
5 United States Senior District Judge

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